No. 95-2028

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOSEPH WALTER COX,
BENNIE BURGAN, JR. - - - - - *Petitioners*

versus

GREGORY TREADWAY, ET AL. - - - *Respondent*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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July 17, 1996

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, in Addition to Being Instructed on the Use of Excessive Force During the Course of an Arrest, the Jury Should Also Have Been Instructed That It Was a Violation of the Fourth Amendment to the United States Constitution for an Officer to Use Physical Force on a Citizen Who Has Been Arrested and Restrained.

II. Whether the federal Appeals Court Erred When It Held That It Was Not Error for the Trial Court to Fail to Recognize That Statements Were Admissable on a Ground Never Clearly Identified by Petitioners' Counsel Either Descriptively or by Reference to the Appropriate Federal Rule of Evidence.

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v.

GREGORY TREADWAY, Et Al - - - - - *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the petition for writ of certiorari seeking review of an opinion of the Sixth Circuit Court of Appeals. The court of appeals decision is reported at 75 F.3d 230 (6th Cir. 1996), *petition for cert filed*, 64 U.S.L.W. 3856 (U.S. June 25, 1996) (No. 95-2028).

STATEMENT OF THE CASE

A. THE EVIDENCE

On the evening of June 20, 1990, Louisville narcotics officers were preparing to conclude an ongoing operation which was meant to culminate with a drug buy, and the arrest of, Plaintiff, Joseph Cox [R 124, TE III, pp. 19-20]. The plan was this: a police informant, Wayne Sprigg, would meet Mr. Cox at a truck stop. There, Mr. Sprigg would sell Mr. Cox some marijuana provided by the police.

The marijuana would be located in the trunk of Sprigg's car. Mr. Sprigg would give to Mr. Cox or Plaintiff, Bennie Burgan, Jr. a key, supposedly to Sprigg's car. This key, however, would not actually start the car with the marijuana in it. After the deal, the officers would move in. [R 124, TE III, pp. 20-21, 152].

However, the police plan went awry. Mr. Burgan was somehow able to start the Cutlass with the key. Both cars — one driven by Mr. Burgan and one driven by Mr. Cox with Mr. Sprigg — exited the parking lot and drove off in different directions [R 124, TE III, pp. 153, 164]. The officers in the parking lot, surprised, soon followed; they drove out of the parking lot in different directions and began to search for both cars [R 124, TE III, pp. 26, 50, 153, 164].

Defendant, Detective Robert O'Neil, in one car and Detectives Daniel Hyland and Russell Wilson in another soon managed to find Cox's car. Mr. Cox was unable to pass Detective O'Neil, so he pulled over into a yard along the side of the road and fled on foot [R 124, TE III, pp. 108-109, 118]. The detectives pulled over and pursued Mr. Cox [R 124, TE III, pp. 118,]. It was dark, and they were running at top speed [R 124, TE II, p. 192; TE III, pp. 109, 125]. They came to a ravine and the three detectives fell in, cutting and bruising themselves [R 124 , TE II, p. 194; TE III, pp. 110-111,]. At this point the detectives thought they had lost Cox, but they soon found him hiding nearby [R 124, TE III, pp. 119-120]. Mr. Cox had likely fallen into the ravine as well: although he later testified that he had deliberately descended into the ditch [R 124, TE I, pp. 90-91], it would have been impossible for him not to have fallen into the ravine given the speed at which he was running and the lack of light [R 124, TE III, p 110].

By the time they apprehended Mr. Cox, Defendant, Detective Jerry Warman, had arrived [R 124, TE III, p. 51],

and he helped pull Mr. Cox up out of the ravine [R 124, TE II, pp. 168, 194; TE III, pp. 54, 125]. The area was by now lighted by the headlights of a car which had arrived [R 124, TE III, pp. 124-125]. Detective Warman instructed Mr. Cox to get on the ground and proceeded, with the assistance of Defendant, Detective Michael Dossett, who had also since arrived, to secure Cox's hands behind his back with a military whip belt [R 124, TE II, pp. 169; TE III, pp. 54, 113, 125]. Mr. Cox was taken back to the road, handcuffed, and put in Detective Dossett's car [R 124, TE II, p. 151; TE III, pp. 55, 57, 113].

According to the testimony of the police officers, at no time during this entire episode did anyone strike or kick Mr. Cox [R 124, TE II, pp. 151, 172, 187-188, 195; TE III, pp. 56, 113-115, 120-121, 126, 166].

Except for Detective O'Neil, who had to stay with his car which had hit a tree, the detectives, plus Mr. Cox and Mr. Sprigg, then returned to the search at the truck stop for Mr. Burgan [R 124, TE III, pp. 57, 114, 126, 166]. At the truck stop, Mr. Burgan was spotted pulling into and then leaving the parking lot.

Mr. Burgan eventually turned around and headed back. [R 124, TE III, p. 143]. Defendant, Detective John Winstead, saw him doing this and reported it on the radio [R 124, TE III, pp. 58, 60, 128, 144, 168]. At this point, Detective Dossett, driving the car with Mr. Cox and Detective Warman [R 124, TE II, pp. 152-153], decided to turn around because he wanted to protect his prisoner by staying out of the way [R 124, TE III, pp. 60, 128-129]. As he was trying to turn around in a driveway along the road, the car driven by Mr. Burgan drove over a hill into view, slowed down, then accelerated and collided with Detective Dossett's vehicle [R 124, TE III, pp. 60, 91, 129]. Both Detective Warman and Detective Dossett were thrown to the windshield, but were not seriously injured [R 124, TE III, pp. 60-61, 131].

Detective Warman immediately jumped out of the car and ran over to Mr. Burgan's driver door, which was somewhat jammed from the wreck, and tried to get it open [R 124, TE III, pp. 61,]. He eventually succeeded somewhat in getting the door open and reached in to pull Mr. Burgan out of the car [R 124, TE III, pp. 61,]. Mr. Burgan, meanwhile, was struggling, kicking, and trying to get out the other door [R 124, TE II, pp. 174-175; TE III, p. 62]. After Detective Warman succeeded in pulling Mr. Burgan out, he instructed Mr. Burgan to get down on the ground, and tried to push him down when Mr. Burgan struggled and tried to push past him [R 124, TE II, pp. 161, 174-175; TE III, p. 62]. Then Detective Warman got Mr. Burgan in a bear hug, and with the assistance of Detective John Winstead, who had since arrived at the collision scene, handcuffs were put on him [R 124, TE II, p. 162; TE III, pp. 62-63, 144-145]. Other officers were arriving at various times after the collision [R 124, TE III, pp. 8-9, 27, 85, 153].

Detective Warman leaned Mr. Burgan on the back of the trunk and searched him for weapons and then placed him in a car [R 124, TE III, pp. 63-64]. Detective Warman had noticed blood on himself, and when he put Mr. Burgan in a car he noticed that Mr. Burgan had a minor head injury [R 124, TE II, p. 176; TE III, pp. 40, 66]. Mr. Burgan told Defendant, Sergeant William P. Hanka, that he was injured in the automobile collision [R 124, TE III, p. 33]. He also told Kentucky State Trooper Hess the same thing [R 124, TE III, p. 95]. Detective Katherine Felice of the Kentucky State Police noticed that Mr. Burgan had blood on his head soon after he was taken out of the Cutlass and before he was leaned on the rear of the car [R 124, TE III, pp. 94]. Also, Mr. Burgan would later tell Detective Daniel Assef that he was injured in the collision when he would be in his custody at Mr. Burgan's residence [R 124, TE III, p. 155], and he would likewise tell the

admitting nurse the same thing when he would be taken to a hospital to have his injury treated [R 124, TE II, p. 163; TE III, p. 175].

According to the testimony of the police officers, at no time did any officer strike Mr. Burgan or Mr. Cox, nor did any officer put a gun in Mr. Cox's mouth [R 124, TE II, pp. 162-163; TE III, pp. 9, 37, 66, 74, 86, 96, 134, 146-147, 154, 171-172, 176].

Mr. Burgan told the officers that he had taken the marijuana out of the trunk and left it at this house, so that was their next destination [R 124, TE III, pp. 34, 67, 146-147, 171-172]. The officers searched the house and found three of the five bags of marijuana in the kitchen [R 124, TE III, pp. 35, 67, 147-148].

A neighbor alerted the officers that she had seen someone running through a field behind the house with some bags, and the officers found the other two bags of marijuana in the field [R 124, TE III, pp. 11, 69, 148]. According to the testimony of the police officers, at no time did anyone strike or choke Mr. Burgan [R 124, TE III, pp. 37-38, 75, 86, 149, 157, 173, 176].

Detectives Treadway and Winstead took Mr. Burgan back to a hospital in Louisville for treatment of his head injury [R 124, TE III, p. 149, 173]. Many hours later, they took him to Jefferson County Jail [R 124, TE III, p. 175]. Detectives Assef and Warman returned to the automobile collision scene to pick up Mr. Cox and took him back to Jefferson County Jail [R 124, TE III, pp. 69-70, 158].

At trial, Mr. Cox entered into evidence a T-shirt with footprints on it, which he claimed he was wearing the night of his arrest [R 124, TE I, pp. 105-107]. On cross-examination it was shown that he had exclusive possession of the shirt from June 20, 1990 until March or April of 1991 [R 124, TE I, p. 110]. In fact, he was not even wearing a shirt

that night [R 124, TE II, p. 152; TE III, pp. 72, 83, 125, 135].

On cross-examination, it was shown that Mr. Sprigg, the informant, did in fact know why the police were investigating him, in contradiction to what he had claimed on direct [R 124, TE II, p. 81]. It was also brought out that Mr. Sprigg bore ill feelings towards the police and Detective Treadway in particular. He felt betrayed by the police when they arrested his friend Jeff Elder; he felt that the police had agreed not to arrest Mr. Elder [R 124, TE II, pp. 82-83]. Mr. Sprigg also felt that the prosecutors had promised he would get paid for his participation, yet he did not get paid [R 124, TE II, pp. 84-85]. Furthermore, he believed that Detective Treadway had stolen from him [R 124, TE II, p. 91].

Detective Treadway, when being questioned at trial, did not, as is asserted in appellants' brief, admit to lying before the grand jury in the criminal case. Rather, he explained to counsel that when testifying before a grand jury a witness is allowed to use hearsay. He explained that the apparent discrepancy in his testimony was explained by this difference in evidentiary standards [R 124, TE III, p. 13].

Mark Chandler and Keith Kamenish were called as rebuttal witnesses. Mr. Chandler, who had been a Commonwealth Attorney associated with the criminal case, testified that Wayne Sprigg never complained to him about excessive force [R 124, TE III, p. 183]. Mr. Sprigg had claimed to have done so during his testimony [R 124, TE II, p. 38]. Mr. Kamenish, the Commonwealth Attorney who took over when Mr. Chandler left the criminal case, testified that Mr. Sprigg never complained about excessive force, but that he had expressed a hatred of Detective Treadway [R 124, TE III, p. 188].

B. CORRECTION OF MISSTATEMENTS IN THE PETITION

Pursuant to United States Supreme Court Rule 15.1, respondents bring the following misstatements of facts contained in the petition to the Court's attention.

In the Proceedings Below (Petition at 13), Petitioners misrepresent to this Court the contents of the note signed by some of the jurors. As they have done all through these appellate proceedings, petitioners continue to selectively quote from the note only that portion which appears to aid their cause. The note reads in its entirety as follows:

> To Judge Rubin,
>
> Some jurors feel that something definitely happened 6-20-90. However, the preponderance of evidence was not sufficient to render a decision for the plaintiff.

Petitioners also misrepresent (Petition at 14) that one judge on the Court of Appeals would have reversed because of the refusal of the trial judge to instruct on unnecessary force. Judge Moore, in fact, would have required what she termed the Fourth Amendment post-restraint instruction in addition to the instruction actually given to the jury.

REASONS FOR DENYING THE WRIT

I.

THE PETITIONERS HAVE NOT PRESENTED A SPECIAL AND IMPORTANT QUESTION.

A Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. SCR 10(1). "Special and important reasons" within this Rule relate to problems beyond the academic or episodic, especially where the issues involved reach constitutional proportions. *Rice* v. *Sioux City Memorial Park Cemetery, Iowa,* 349 US 70 (1955). The principal reason for the Supreme

Court to use certiorari jurisdiction is to resolve conflicts among circuit courts of appeals concerning the meaning of provisions of federal law. *Braxton* v. *United States*, 500 US 344 (1991).

The issues presented by the petitioners do not rise to this standard. The first concerns the writing of an instruction, and the second concerns whether specific evidence was admissible as a prior consistnet statement. In order for the Sixth Circuit's decision in this case to rise to "a special and important reason", there must be either a conflict with the decision of another federal court, or a situation where the circuit court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. SCR 10(1)(a). As discussed below, neither of petitioners' proposed issues involves matters in conflict with the federal circuits, nor matters in which the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings.

II.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS CONCERNING THE NECESSITY OF A POST-RESTRAINT INSTRUCTION IN ADDITION TO THE *GRAHAM* V. *CONNOR* EXCESSIVE FORCE INSTRUCTION DURING THE COURSE OF AN ARREST.

There is no conflict between the circuits on this issue because the case was resolved by application of United States Supreme Court case law.

In *Graham* v. *Connor*, 490 US 386 (1989), this Court made it clear that "all claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard."

What Petitioners are now attempting to do, is to transform their claims from one involving their apprehension, detention and arrest into a claim solely of custodial interrogation. While Petitioners assert that their claims are most closely analogous to those of plaintiffs who allege that their civil rights have been violated by physical abuse during custodial interrogation, the facts of this case do not support such an assertion.

All of the alleged acts by the Respondents occurred in a continuous incident during the early morning hours of 20 June, 1990 in rural Henry County, Kentucky and before the Petitioners were transported to either the hospital or jail by some of the arresting officers.

Of the cases cited by petitioners in support of their assertion, four are clearly distinguishable by their facts to Petitioners situation. *Ware* v. *Reed*, 709 F.2d 345 (5th Cir 1983) involved the interrogation of the plaintiff at the police station; *Gray* v. *Spillman*, 925 F.2d 90 (4th Cir 1991) involved plaintiff's interrogation while confined in jail; *Cox* v. *County of Suffolk*, 780 F.Supp. 103 (E.D.N.Y. 1991) involved questioning of the plaintiff at the police station; and *Cohen* v. *Coahoma County, Miss.*, 805 F.Supp. 398 (N.D.Miss. 1992) involved interrogation of plaintiff by the sheriff while a prisoner in jail.

Even Petitioners must admit that their claims do not arise out of facts even remotely similar to those in the cited cases. The whole of the events alleged by Petitioners occurred in the early morning hours in rural Henry County, Kentucky during the course of the pursuit, apprehension and arrest of the petitioners, and not in the controlled atmosphere of a jail or police station.

Two other cases cited by petitioners were decided before *Graham*, but both use "reasonableness", as later adopted by *Graham*, as the deciding standard.

In *Lewis* v. *Downs*, 774 F.2d 711 (6th Cir 1985), the Sixth Circuit, analyzing the case under the due process provisions of the Fourteenth Amendment, held that the unprovoked and unnecessary striking of a handcuffed individual, who was of no danger whatsoever, was unreasonable and clearly excessive.

In *McDowell* v. *Rogers*, 863 F.2d 1302 (6th Cir. 1988), the Sixth Circuit, citing to *Robins* v. *Harum*, 773 F.2d 1004 (9th Cir 1985), held:

> "the seizure that occurs when a person is arrested continues throughout the time the person remains in the custody of the arresting officers, and therefore, there was no need to look beyond the Fourth Amendment in determining whether the plaintiff made out a jury case."

As Judge Ryan said in this case:

> "Any claim alleging a violation of the Fourth Amendment must include an inquiry into the reasonableness of the action taken.

And, contrary to petitioners' assertion in their petition at page 19 that there is a "bright line" between the process of arrest, which ends with a suspect being handcuffed and subdued, and the post-restraint stage, Judge Ryan went on to say:

> *Graham's* "in the course of an arrest" requirement does not have an inherent ending point. The determination when an arrest ends and "custody" begins is a question that must be answered by looking at the totality of the circumstances of each case."

Speaking of *McDowell*, Judge Ryan said:

> "However, the court in *McDowell* was not crystallizing the facts of that case to transform them into a *per se* Fourth Amendment rule. Rather, the court explicitly engaged in a "reasonableness" inquiry and determined that the force applied in *that* particular case was unreasonable."

While Judge Moore would have given, in addition to the *Graham* excessive force instruction, a post-restraint instruction based upon her determination that this case involved both pre-arrest and post-restraint conduct, the majority of the panel held that the course of arrest had not ended and, thus, only the *Graham* excessive force instruction was required.

In any event, given the evidence and instructions presented to the jury, the petitioners could have argued their theory of the case; and distinguished between the alleged pre-arrest and post-arrest events. Had the jury believed that petitioners had produced a preponderance of evidence to support any portion of their case, it could have found for the petitioners.

The court having held that the course of arrest continued throughout the events complained of by petitioners, there is no conflict between the holding of the appellate court in this case and the holdings in other circuits; and the petition herein should be denied.

II.

THIS COURT'S SUPERVISORY ROLE IS NOT CALLED INTO QUESTION BY THE APPELLATE COURT'S DECISION WITH REGARD TO THE STATEMENTS BY THE POLICE INFORMANT.

Petitioners' second offered ground for granting their petition is not one which is subject to this Court's exercise of its supervisory authority over the lower federal courts. The supervisory power of this Court serves the two-fold purpose of deterring illegality and protecting judicial integrity. *United State* v. *Payne,* 447 US 727 (1980). Neither of these purposes is served by petitioners' offered ground.

Petitioners do not contend that either the trial court or appellate court acted illegally, nor do they contend that the integrity of the judiciary is at stake by the evidentiary

ruling of the trial court. They simply contend that the trial court's ruling was erroneous [Petition at 27].

As in *James* v. *Kentucky*, 466 US 341 (1984), the supervisory power of this Court has been exercised in those cases involving evidence issues when the constitutional rights of a party are involved. See *Doyle* v. *Ohio*, 426 US 610 (1976) and *United States* v. *Hale*, 422 US 171 (1975), in which this Court held that a defendant's exercise of this Fifth Amendment right to remain silent could not be used to impeach his trial testimony; and *McNabb* v. *United States*, 318 US 332 (1943), in which it was held that federal courts may use their supervisory power to exclude evidence taken by "willful disobedience of law".

The supervisory power of this Court has also been exercised in those instances involving the practices and procedures of the lower federal courts.

In *Frazier* v. *Heebe*, 482 US 641 (1987), this Court used its supervisory powers to hold invalid a federal district court rule relating to admission to district court bar to insure that local rules are consistent with principles of right and justice; and in *Young* v. *U.S. ex rel. Vuitton et Fils S.A.*, 481 US 787 (1987) held that the supervisory power of this Court is especially appropriate in determination of procedures to be used by courts to enforce orders, a subject that directly concerns functioning of the judiciary.

The issue sought to be raised by petitioners in this case is not one that impacts the constitutional rights of the petitioners, nor does it go to the practices and procedures of the lower federal courts. Petitioners are simply complaining of a fact specific evidentiary ruling that went against them; and the petition herein should be denied.

CONCLUSION

For the reasons set forth above, the writ of certiorari should be denied.

Respectfully submitted,

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